

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1287

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

IN RE THE GRAND JURY EMPANELLED
October 14, 1976

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT WITNESS SUBPOENAED
TO TESTIFY BEFORE GRAND JURY

REAVIS & McGRATH
345 Park Avenue
New York, New York 10022
Attorneys for Appellant
A Witness Subpoenaed To
Testify Before The Grand Jury
(212) 752-6830



TABLE OF CONTENTS

	<u>PAGE</u>
I	
THE ORDER APPEALED FROM IS A FINAL ORDER WHICH COMPLETELY DISPOSES OF ALL THE ISSUES IN THE PROCEEDINGS AND IS THEREFORE APPEALABLE UNDER 28 U.S.C. § 1291	1
II	
THE DEPARTMENT CONCEDES RULE 6(e) DOES NOT PRO- HIBIT THE RELIEF SOUGHT	10
CONCLUSION	18

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Brown v. United States</u> 359 U.S. 41 (1959)	16
<u>Bursey v. United States</u> 466 F.2d 1059 (9th Cir. 1972)	16
<u>Capitol Indemnity Corp. v. First</u> <u>Minnesota Construction Corp.</u> , 405 F.Supp. 927 (D. Mass 1975)	14, 14n, 15
<u>Catlin v. United States</u> , 324 U.S. 229 (1945)	1
<u>Cobbledick v. United States</u> , 308 U.S. 323 (1940)	1, 2, 5
<u>Cohen v. Beneficial Industrial</u> <u>Loan Corporation</u> , 337 U.S. 541 (1948)	7-8, 9
<u>Davis v. Romney</u> , 55 F.R.D. 337 (E.D. Pa. 1972)	9, 11, 13, 14n, 15
<u>DiBella v. United States</u> , 369 U.S. 121 (1962)	1
<u>Eisen v. Carlisle & Jacquelin</u> , 417 U.S. 156 (1974)	8
<u>In Re Braniff Airways, Inc.</u> , 390 F.Supp. 344 (W.D. Tex. 1975).	16
<u>In re Grand Jury Subpoena to Central</u> <u>States, Southeast And Southwest</u> <u>Areas Pension Fund</u> , 225 F.Supp. 923 (N.D. Ill. 1964)	16

<u>CASES</u>	<u>PAGE</u>
<u>Perlman v. United States</u> 247 U.S. 7 (1918)	4-5
<u>U.A.W. v. National Caucus of Labor Committees</u> , 525 F.2d 323 (2d Cir. 1975)	8
<u>United States v. Interstate Dress Carriers Inc.</u> , 280 F.2d 52 (2d Cir. 1960)	11, 13, 14, 15
<u>United States v. Nixon</u> , 418 U.S. 683 (1974)	3
<u>United States v. Ryan</u> , 402 U.S. 530 (1971)	1, 2
<u>Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.</u> , 455 F.2d 770 (2d Cir. 1972) . .	8

I

THE ORDER APPEALED FROM IS A
FINAL ORDER WHICH COMPLETELY
DISPOSES OF ALL THE ISSUES
IN THE PROCEEDINGS AND IS
THEREFORE APPEALABLE UNDER
28 U.S.C. § 1291

We do not contest the point that for this court to have jurisdiction, the order appealed from must be a final decision. 28 U.S.C. § 1291: United States v. Ryan, 402 U.S. 530 (1971); DiBella v. United States, 369 U.S. 121 (1962); Cobbledick v. United States, 309 U.S. 323 (1940).

As to what constitutes a "final" decision, the Supreme Court has stated:

A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

Catlin v. United States, 324 U.S. 229 (1945). Tested by that standard, the order appealed from in the instant case is a final decision.

This proceeding was not instituted to quash the subpoena ad testificandum that was served on the witness and thus the cases cited by the Department indicate a misapprehension of the case.

This case deals with the issue as to whether prior to testifying before the grand jury a witness, under the unique circumstances here present, is entitled to have access to materials which record what he is alleged to have said -- a tape of one conversation and notes of others which are in the possession of the Department. This proceeding was instituted to obtain a determination of that issue, and that issue was finally determined by the order of the court below. Since the witness does not contest the legality of the subpoena and since he will testify, the issue will not arise again and to refuse to hear this appeal will mean that the witness will be denied review of this critical issue.

Thus, this case does not present a situation such as that in Cobbledick v. United States, supra, or United States v. Ryan, supra, which both involved motions to quash subpoenas duces tecum. 309 U.S. at 324; 402 U.S. 530, 532. Because the rights asserted by the subpoenaed witnesses went to the validity of the subpoenas issued there by the grand jury, the Court held that if the witnesses wished to assert those rights they could do so only by refusing to testify and asserting those rights on an appeal from a conviction

for contempt. Such a procedure might make sense in the context of those cases, since it was the validity of the subpoenas which was in issue. However, a much different situation is presented when the validity of the subpoena is not challenged.

In this case, the witness does not claim that the subpoena requiring him to testify is illegal or invalid. Rather, he is asserting a claim that prior to testifying he is entitled to access to the materials in question. He cannot be expected to risk citation for contempt in order to assert those rights. Thus, this case falls within that category of cases where submitting to contempt is not required because "the purposes underlying the finality rule require a different result." United States v. Nixon, 418 U.S. 683, 691 (1974).

Most important, the Department's argument could possibly impair the functioning of the Grand Jury. The Grand Jury is interested in the facts. That is the reason why the Department has obtained an immunity order. The Grand Jury is not interested in fuzzy or hazy recollections or in a witness who is confronted with his voice in the Grand Jury room and who then must search the recesses of his mind to recall specific events that led up to the alleged

conversations.* The Grand Jury is not interested in a game being played in front of it. It is interested in what this witness can tell it to help it in its search for the truth. Judge Briant's comments on the hearing on the application for the Order to Show Cause below (quoted in our Initial Brief at p. 11) put the issue in focus. The object is to present to the Grand Jury the best witness possible and that object is not served by the game-playing in which the Department is engaged. Thus, the entire argument that the Grand Jury is entitled to have this prospectively immunized witness's "unvarnished recollection" evades the issue -- the Grand Jury's right to have all the facts. To fail to decide the critical issue presented here would mean, on these facts, that the issue is lost, the Grand Jury looses, and the witness is put at substantial peril.

This case presents a situation analogous to that presented in Perlman v. United States, 247 U.S. 7 (1918) where exhibits owned by Perlman and impounded in court

* And this is what the Department has told us it is interested in. The Department is not so much interested in this witness, but in who he may have talked with prior to the alleged conversations. (J.A. 19a, 78a.) Thus, not to allow him to refresh his recollection in an unhurried, unpressured atmosphere will not serve the Grand Jury's desire to hear all of the facts.

during a patent suit were, on motion of the United States attorney, ordered produced before a grand jury in connection with an investigation of Perlman. Perlman petitioned the district court to prohibit their production invoking, inter alia, the privilege against self-incrimination. His petition was denied and he appealed. The Government asserted that the order was not appealable because it was not final. The Court rejected this contention, noting:

The second contention of the government is somewhat strange; that is, that the order granted upon its solicitation was not final as to Perlman, but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order, but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

Id. at 12-13.

As in Perlman, the instant case presents a situation where appeal must be granted now or the witness will be "powerless to avert the mischief of the order." The nature of the asserted right here is not such that a review of the claim of that right would lead to a piecemeal appeal. The right claimed here is not "a component element in a unified cause", Cobbledick v. United States, supra, 309 U.S. at 325; rather it is a separate issue altogether.

The Department also asserts that the reason for the rule of finality as to orders relating to grand jury testimony makes sense here in order to assure that grand jury proceedings are not disrupted or delayed by intermittent appeals. But that reason is not applicable here. The Grand Jury is in recess for the summer (J.A. 48a). Moreover, allowance of an appeal in the instant case would not set a precedent that would result in disrupting or delaying future grand juries. This case can be easily limited to its particular facts. Appellant is a cooperative witness; the Department has obtained an order of immunity for the witness; the Department has materials in its possession which relate to conversations in which the witness participated, but of which he has no recollection; and the Department has informed the witness of the existence of, and certain circumstances concerning, those materials in an attempt to refresh his recollection. Similar cases are unlikely to occur in the future because the government is not required to reveal to a prospective witness the existence of materials in its possession which relate to his testimony. Having done so, it is only fair that there be an appellate determination as to whether the contents of the materials should be made available to the witness before he

testifies.

Further, even if the Department decides to reveal the existence of such materials to a witness, it can avoid delay of the grand jury's investigation by revealing the content of those materials to the witness pursuant to its authority under Rule 6(e) of the Federal Rules of Criminal Procedure to use materials submitted to the grand jury in preparing witnesses to appear before the grand jury.

And, even if the order here were not a final determination of the controversy between the parties, it still would be appealable under the collateral order rule promulgated by the Supreme Court in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1948). In that case, the Court held appealable an order which was admittedly not final in the sense that it did not dispose of the entire proceeding, stating:

This decision appears to fall in the small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

* * * *

We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

Id. at 546-547. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-172 (1974); UAW v. National Caucus of Labor Committees, 525 F.2d 323 (2d Cir. 1975); Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972). The Court also noted in Cohen that the rule of finality was to be given a "practical rather than a technical construction." 337 U.S. at 546.

We submit that this case is of utmost importance to the administration of justice in the federal system. Here we have a situation where the Department having disclosed the existence of the materials and the existence of the meetings to which they relate for the purpose of refreshing recollection (Dept. Br. 18), now says it doesn't "want" the witness to have the materials. It is not what the Department "wants" that controls; it is what, given what the Department has already done, it should now do; and what type of witness a grand jury is entitled to. (See pp. 3-4 supra.) Only now can these important issues be decided.

There is also the question of fairness to the witness that is in issue. And that issue will be lost if not decided now. No vindication of his rights at a later time could remedy the damage to the witness's reputation and standing in the business community that would result if the

Grand Jury should believe he is lying and indict him for perjury. And even an acquittal on such a charge could not undo the harm that would be done by an indictment.

The unsettled and important issues presented by this case, being independent of the issues that would be presented on any appeal after the testimony or after a trial require that the Cohen doctrine be applied to allow this appeal to be heard at this time.

II

THE DEPARTMENT CONCEDES RULE 6(e) DOES NOT PRO- HIBIT THE RELIEF SOUGHT

In our Initial Brief we argued that Rule 6(e), rather than prohibiting the relief sought, as the Department had posited, actually permits it. (Initial Brief, pp. 22, 26-28). Buried in a footnote on the last page of its Brief, the Department concedes that point. Thus, the Department states that it disclosed the existence of the materials in question prior to Appellant's appearance "in an attempt to encourage Appellant to recall the conversations recorded in these materials" and then justifies that activity on precisely the ground we have urged, viz., "Rule 6(e) expressly authorizes Government attorneys to use grand jury materials 'in the performance of their duties'". (Dept. Br. p. 18).

Thus, the consideration of this whole dispute must be viewed this way: while Rule 6(e) "expressly authorizes" the access sought, the Department does not want -- as opposed to can't allow -- the witness to have access to these materials. Placed in that, its proper, context, we now turn to the Department's argument.

The Department argues that the documents here sought fall within the ambit of Rule 6(e) citing language from United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960) to the effect that documents may come within Rule 6(e)'s prohibiting language. (Dept. Br. 11.) With that statement we have no disagreement. We have not argued that under no circumstances might a document fall within Rule 6(e). But the cases have clearly articulated under what circumstances documents sought become entitled to the protection of the Rule. Simply because a document is under subpoena, or may have been examined, by a grand jury does not automatically render it prohibited from disclosure under Rule 6(e). See Davis v. Romney, 55 F.R.D. 337, 341 (E.D. Pa. 1972).

The Department argues that the documents here "must be protected . . . in order to prevent [Appellant] from discovering the testimony of prior grand jury witnesses." (Dept. Br. 11-12) While the Department makes that point, it never quite supports it; the point is, in short, a non sequitur. It notes that the documents concern an "on-going investigation" and that the "individual who prepared these notes and tapes has already testified before the grand jury concerning these conversations." (Dept. Br. 12) We fail to see how those circumstances entitle these materials

to the protection of Rule 6(e), nor can we fathom how these factors support the thought that the Appellant will thereby discover the testimony of a prior witness. The transcript of that witness's testimony is protected under Rule 6(e). We have not requested it. We will not see it. The fact that he has testified about these alleged conversations could easily have been surmised from what the Department had previously disclosed to us before this proceeding was begun. And now the Department discloses that the witness has, in fact, so testified. This fact is of no moment. We will not learn what questions that witness was asked, what answers, if any, he gave, or whether, in fact, he testified at all with respect to these materials. The tape and the notes are pre-existing, concrete, finite items. Even if the witness did testify about them, what he said about them or whether he explained them in one fashion or another cannot be gleaned from the materials sought. The Department must have recognized that its conclusion that the witness's prior testimony would be discovered does not follow from the support it provides. Later in its brief the Department reduces the level of its claim in this regard and switches from a claim that testimony will somehow be discovered to the assertion that the "subject matter" of the witness's testimony will be

disclosed. (Dept. Brief at p. 12.) But, in any event, the subject matter is already known as a result of Counsel and the Appellant having been informed by the Department that the witness who produced the materials testified about the conversations to which they relate -- and those conversations have, generally, been described to us by the Department. (J.A. 6a-9a, 45a-47a.)

In sum, the Department argues the proposition, rejected in Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972), "that the grand jury has a Midas like quality in that everything it touches becomes a secret." Id. at 341. But that is not the law. As the Davis Court noted, the production of the documents there sought was not inappropriate because "[n]o one will know what happened when this material was examined by the grand jury and what was culled from it, if anything." Id. at 341. As the Court also noted, the evils of disclosure in a Rule 6(e) situation "could occur only upon some intimate knowledge of the grand jury's use of the information in the [materials]." Id. at 342. Or, as this Court noted in Interstate Dress Carriers, 280 F.2d 52, 54 (2d Cir. 1960), the inspection sought would "in no way infringe upon the secrecy of the grand jury's deliberations", since those seeking them "do not seek to learn what use the grand jury has made of [the materials]". And,

finally, we note that in Capital Indemnity Corp. v. First Minnesota Const. Co., 405 F.Supp. 929 (D. Mass. 1975), where the movant requested specific documents which the Government acknowledged were being reviewed by the grand jury, disclosure was allowed. Thus, while the documents may be protected by Rule 6(e) if they somehow disclose "what happened when it was examined by the Grand Jury", or if somehow they lay bare the thinking or the culling engaged in by the grand jury, the fact that the grand jury has seen or examined them does not cloak them with Rule 6(e)'s protective mantle.

The Department next attacks the claim that these documents are sought for their "intrinsic value." As we read the cases and as we understand that term, the Department is wrong. Granted that here the documents are not sought for the purpose expressed in Interstate Dress Carriers, supra, but no court has ruled that it is only in that limited context that documents sought for themselves are excluded from Rule 6(e).* "Sought for themselves", is the key to understanding the meaning of intrinsic value. The Department argues that because the documents are sought in

* Indeed, it is clear from the context of other cases that there is no such limitation. Davis v. Romney, supra; Capital Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975).

connection with a grand jury investigation that, therefore, they are not sought for their own intrinsic value. That is a non sequitur. We should not get caught up in language. The point is that as long as the materials are not sought to discover what has transpired before the grand jury but, rather, because the materials themselves are sought for important and proper purposes to the individual seeking them, Rule 6(e) does not apply. The cases make that point clear. The cases, when describing the term, always couch it this way -- when documents are sought for their own intrinsic value, rather than to learn what transpired, or took place, before the grand jury, they may be obtained. United States v. Interstate Dress Carriers, supra at 54; Davis v. Romney, supra at 341; and Capital Indemnity Corp. v. First Minnesota Const. Co., supra at 931.

We argued in our Initial Brief (pp. 22-28) that, while we did not believe the Court had to reach the question, sufficient particularized need had been shown to justify the relief sought. In response, the Department merely asserts that they disagree. If this issue must be reached, therefore, there is nothing we have to add. The Appellant's need has been articulated, and at least one court has found the same type of need a compelling reason

for disclosure. In re Braniff Airways, Inc., 390 F.Supp. 344 (W.D. Tex. 1975). The issue is ripe for adjudication.

The Department does add another thought -- alleged prejudice to the functioning of the grand jury. (Dept. Br. 17) Its claim of prejudice holds up, however, only if one accepts the proposition that the Grand Jury's primary and most important role is not to get at the truth and as much of it as possible in order to get to the bottom of matters. As articulated by the Department, it appears to have other thoughts in mind. It seems to want to insure that Appellant is surprised, or worse, trapped. We must remember here that the Department, while purporting to argue the Grand Jury's side of this issue, does not actually speak for that body. The Grand Jury exists separate and apart from the Department of Justice. It is not and should not be an arm of the Department. If it has any connection with Government, it is as a part of the judicial branch. Brown v. United States, 359 U.S. 41, 49 (1959); Bursey v. United States, 466 F.2d 1059, 1082 (9th Cir. 1972); In re Grand Jury Subpoena To Central States, Southeast and Southwest Areas Pension Fund, August Term, 1963, 225 F.Supp. 923, 925 (N.D. Ill. 1964).

Thus, the Department's motives and desires do not control. What does control -- since we can't have a majority vote of the grand jurors on this issue -- is what makes the most sense, consistent with the function of the Grand Jury. The Department is not entitled to anything here.* The Grand Jury, however, is. And we submit it is entitled to this prospectively immunized witness's best recollection based upon all the available help he can get. If, when questioned, Appellant's recollection falters, as it has previously with respect to the same matters the Department intends to question him on (J.A. 7a-10a), or he needs time to think, or he is confused or surprised, it is unlikely that the Grand Jury will be hearing the best witness it can obtain.

* Indeed, while the Department cites Judge Owen's ruling in support of its position, we submit that the Court below was incorrect in this regard when it stated:

"I think the Government is entitled to his unvarnished recollection or absent (sic) of it" (J.A. 85A)

CONCLUSION

For the reasons stated here and in our Initial Brief, the Order appealed from should be reversed.

Dated: New York, New York
August 8, 1977

Reavis & McGrath

By Stephen R. Steinberg / 408
A Member of the Firm

Attorneys for Appellant
A Witness Subpoenaed to Testify
Before the Grand Jury

345 Park Avenue
New York, New York 10022
(212) 752-6830

Of Counsel:

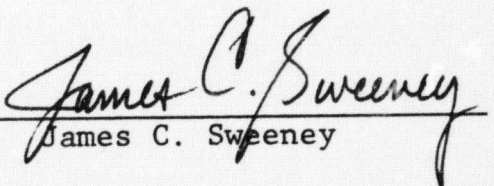
Stephen R. Steinberg
Joseph A. Clark III

AFFIDAVIT OF SERVICE BY MAIL

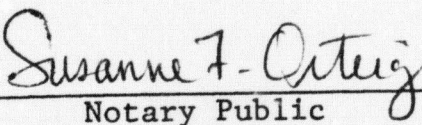
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JAMES C. SWEENEY, being duly sworn, deposes and
says:

I am not a party to this action. On July 22,
1977, I served a copy of the annexed Appellant's Reply
Brief upon The United States Department of Justice,
Antitrust Division, Attn: John Powers, Esq., Washington,
D.C. 20530 by causing the same to be deposited at a
United States Postal Service Office in a post-paid,
properly addressed envelope for delivery by Express
Mail to said attorney at the address above stated.


James C. Sweeney

Sworn to before me this
8th day of August, 1977.


Notary Public

SUSANNE F. ORTEIG
Notary Public, State of New York
No. 60-4629437
Qualified in Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1978

